

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 17, 2006 Session

DAMON FIERRO v. MELITA FAE FIERRO

Appeal from the Chancery Court for Rutherford County
No. 03-7737DR Royce Taylor, Judge

No. M2005-02638-COA-R3-CV - Filed on April 27, 2007

In this appeal involving a marriage of a relatively short duration, the husband contends the trial court erred by not dividing the property in a way that, as nearly as possible, placed the parties in the same position they would have been in had the marriage never taken place. He also contends the wife dissipated the marital property to pay off her student loans. The trial court made a specific finding that the property had been transmuted in such fashion as to make it impossible to put the parties back in the same position they were in at the time of the marriage. The court also stated that it took into consideration the wife's use of marital property to pay off her student loans as it allocated the few marital assets that remained at the time of the divorce. We have concluded the evidence does not preponderate against the trial court's findings and, therefore, affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Larry Hayes, Jr., Nashville, Tennessee, for the appellant, Damon Fierro.

William Kennerly Burger, Murfreesboro, Tennessee, for the appellee, Melita Fae Fierro.

OPINION

Damon Fierro and Melita Fae Fierro, both of whom are now physicians, met during their medical residencies at Vanderbilt University in Nashville, Tennessee. They married in June 2001 at which time Damon Fierro, Husband, came into the marriage with considerable assets, and Melita Fae Fierro, Wife, came into the marriage with a significant negative net worth, comprised mostly of school loans in excess of \$200,000.

Following their residencies, both parties became established doctors in Murfreesboro, Tennessee, earning sizable annual incomes of approximately \$200,000 each. During the relatively brief marriage, the parties entered into several significant financial transactions, including the

purchase of several cars, two valuable homes, and a farm in Lincoln County. In addition thereto, Wife made numerous periodic payments on her student loans during the marriage, reducing her debt by approximately \$215,000.

The parties experienced significant marital difficulties early on in the marriage, which were complicated by Husband accepting a job as an emergency room physician in Huntsville, Alabama in September of 2003 while Wife continued to live and work in Murfreesboro as a pediatrician. Shortly after Husband's moved to Huntsville, Alabama, he filed for divorce. The Complaint for Divorce was filed on December 5, 2003. On the same day, the trial court entered a Restraining Order which restrained both parties "from transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party of an order of the court, of any marital property."

During the next few months the parties attempted reconciliation, which included formal marriage counseling. During the reconciliation period, which went on for a significant period of time, they purchased a farm and home in Lincoln County where they occasionally cohabited during the reconciliation period. The purchase of the farm occurred in April of 2004. The attempt at reconciliation proved unsuccessful. As a consequence, Wife filed an Answer and Counterclaim on February 23, 2005.¹

A contested hearing was held in September of 2005, following which the trial court entered the Final Decree declaring the parties divorced on October 13, 2005. In the Final Decree, the trial court held that despite the brevity of the marriage, the substantial number of financial transactions that occurred during the marriage, including purchases, sales, transfers, acquisitions, and liquidations of significant assets, made it impractical to restore the parties to the financial position they were in prior to the marriage. As a consequence, the trial court set out to make an equitable division of the marital assets.

The trial court stated that it considered the various purchases made by the parties during the marriage. The court also stated that Wife had dissipated marital assets by making significant payments on her student loans, which it considered in division of the modest marital estate that remained. Based on these findings, the trial court awarded Husband the significant majority of the remaining assets. The court additionally denied Wife's request to recoup her attorney fees. Appeals by both parties followed.

STANDARD OF REVIEW

The division of the parties' marital estate begins with the classification of the property as separate or marital property. *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Tennessee

¹Each spouse focused on the alleged infidelity of the other spouse throughout his and her brief. We find the alleged conduct, much of which was admitted, of little consequence to the issues presented in this appeal. Accordingly, we find it unnecessary to restate the inappropriate marital conduct that is alleged.

is a "dual property" state, *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002), thus, it cannot be included in the marital estate unless it is "marital property." The definition of that term is found in Tenn. Code Ann. § 36-4-121(b)(1)(A). "Separate property," as that term is defined in Tenn. Code Ann. § 36-4-121(b)(2), is not marital property. Therefore, separate property should not be included in the marital estate. *Woods v. Woods*, No. M2002-01736-COA-R3-CV, 2005 WL 1651787, at *3 (Tenn. Ct. App. July 12, 2005). Property classification is a question of fact. *Mitts v. Mitts*, 39 S.W.3d 142, 144-45 (Tenn. Ct. App. 2000). Thus, we review the trial court's classification using the familiar standard of review in Tenn. R. App. P. 13(d).

Once property has been classified as marital property, the court should place a reasonable value on property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003). The parties have the burden to provide competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values presented. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997). Decisions regarding the value of marital property are questions of fact, *Kinard*, 986 S.W.2d at 231; thus, they are not second-guessed on appeal unless they are not supported by a preponderance of the evidence. *Smith*, 93 S.W.3d at 875.

Once the marital property has been valued, the trial court is to divide the marital property in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller*, 81 S.W.3d at 775. A division of marital property in an equitable manner does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c). *Kinard*, 986 S.W.2d at 230. Trial courts have wide latitude in fashioning an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983) and this court accords great weight to the trial court's division of marital property. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, we defer to the trial court's division of the marital estate unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

The difficulty in classifying property as marital property or separate property may be exacerbated when the property undergoes a metamorphosis during the marriage or when the nonowner spouse contributes substantially to the preservation or appreciation of the separate property. This is because marital property can become separate property when a spouse gives it to the other spouse, *Kinard*, 986 S.W.2d 220, 232 (Tenn. Ct. App. 1998), and separate property can become marital property when its original owner commingles it with marital property. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002). To complicate matters, the increase in the value of separate property, and the income from separate property, may be considered marital property if the nonowner spouse contributed substantially to the separate property's preservation and appreciation. Tenn. Code Ann. § 36-4-121(b)(1)(B); *Cohen v. Cohen*, 937 S.W.2d 823, 832-33 (Tenn. 1996).

DIVISION OF THE MARITAL ESTATE

Husband appeals contending the trial court erred by not dividing the property in a way that, as nearly as possible, placed the parties in the same position they would have been in had they never married. His argument is premised on the fact the marriage lasted only four years and our holding in *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). In *Batson*, the parties had been married seven years and we held, “[i]n cases involving a marriage of relatively short duration, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place.” *Batson*, 769 S.W.2d at 859 (citing *In re Marriage of McInnis*, 62 Or. App. 524, 661 P.2d 942, 943 (1983)).

Here, the trial court found *Batson* inapplicable due to the numerous and significant financial transactions that occurred during the marriage stating, “the parties have been married long enough and the property has been transmuted in such fashion as to make it impossible to put the parties back in the same position they were in at the time of the marriage.” During the parties’ marriage, they acquired a home in Rutherford County, Tennessee, another home in Huntsville, Alabama, and a farm in Lincoln County, Tennessee. They also acquired several vehicles, including two that were not inexpensive, a BMW and a Porsche. In addition thereto, the parties used the marital checking account to pay a substantial sum toward various debts, many of which were Wife’s school loans.

Based upon the foregoing facts, the trial court concluded that the parties’ numerous and significant financial transactions made it impractical to divide the property in a way that, as nearly as possible, placed the parties in the same position they would have been in had they never married. This decision is not inconsistent with our holding in *Batson* due to the significant factual differences. See *Powell v. Powell*, 124 S.W.3d 100, 108 n.7 (Tenn. Ct. App. 2003) (wherein we declined to apply *Batson* to a short marriage due to other financial considerations). Accordingly, we find no error with the trial court’s decision to not restore the parties to their premarital status.

Husband alternatively contends the estate was not divided equitably. His argument is principally based on the fact that Wife used substantial marital funds to pay off her debts despite knowing that the parties’ marriage was over. Because of her actions, paying off her student loans during the marriage, Husband contends he should be reimbursed for a portion of the payments. Wife counters with the contention that her salary of \$200,000 per year more than justified the sizable payments made toward her student loans, and thus her actions did not constitute an intentional dissipation of the marital estate.

The factors to be considered in making an equitable division of the marital estate are set out in Tenn. Code Ann. § 36-4-121(c). Among these factors is the duration of the marriage. Tenn. Code Ann. § 36-4-121(c)(1). When relatively short marriages are involved, each spouse’s contributions to the accumulation of assets during the marriage is an important factor. *Batson*, 769 S.W.2d at 859(citing *In re Marriage of Peru*, 56 Or. App. 300, 641 P.2d 646, 647 (1982)). Although these are factors to consider in marriages of short duration, the factors are inconsequential when there is little to divide, as is the case here.

When making the equitable division of property, the trial court may consider the contribution of each party to the acquisition, preservation, appreciation, depreciation, or dissipation of the parties' marital or separate property. Tenn. Code Ann. § 36-4-121(c)(5) (2001). In its effort to equitably divide the marital estate, the trial court made several important findings of fact. Specifically, the trial court found that it was obvious Wife would be “using marital funds to pay portions of her student loans.” The trial court also found “the very large payments made by wife after the filing of the divorce were not necessary for the purpose of maintaining her standard of living . . .” and “those payments were in violation of the standard restraining order.” The trial court also found that although Husband acquired income from selling his separate property, he deposited the proceeds from that sale into a joint account, thereby voluntarily transmuting the proceeds into marital property. The Court further considered the parties’ various purchases including two homes, a farm, a BMW, and a Porsche.

Husband contends he should be “reimbursed” for a substantial portion of the payments toward Wife’s student loans, however, Tennessee Code Annotated § 36-4-121(c)(5) provides that dissipation, whether of marital or separate property, must be considered only in the context of the division of marital property. *Broadbent*, 211 S.W.3d at 220. The record reveals the trial court expressly took into consideration Wife’s dissipation of marital funds in its efforts to divide the marital assets equitably.² Moreover, the record reveals the trial court considered the assets Husband brought to the marriage. Thus, Wife’s dissipation of marital assets and Husband’s greater financial contributions were taken into consideration in the division of the marital estate. As the trial court expressly stated, “the court has considered all the factors in attempting to create an equitable division of the marital estate” and “specifically finds that the court is not attempting to provide an equal division in this action.” The trial court went on to state that it found it was “proper to attempt to divide the estate with the husband receiving the majority of the assets as an equitable division.” And the record tells us that is what the trial court set out to do.

Wife was only awarded her 401(k) account, the home in Rutherford County, Tennessee, which the trial court found to have no equity due to an encumbrance on the property,³ a horse saddle, a bicycle, a tennis bracelet, the BMW,⁴ her computer, her personal effects and miscellaneous items

² Although Tennessee Code Annotated § 36-4-121 does not define “dissipation,” the term typically refers to “the use of funds after a marriage is irretrievably broken.” *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006) (citing *Altman v. Altman*, 181 S.W.3d 676, 681-82 (Tenn. Ct. App. 2005) (observing that dissipation of marital property occurs “when the marriage is breaking down”)). Dissipation, therefore, generally occurs in contemplation of the dissolution of a marriage. *Broadbent*, 211 S.W.3d at 220.

³ Wife valued the equity in the residence at a negative \$338, while Husband valued the equity in the residence at \$29,660. The trial court gave it no value.

⁴ Wife contended the trial court improperly classified the BMW as marital property and not as her separate property. The evidence does not preponderate against the trial court’s finding of fact regarding the BMW.

of personal property in the Rutherford County home. By examining Husband's Rule 7⁵ table we note that Wife was awarded \$137,391 of the marital estate, of which \$101,001 was for her 401(k) account, \$25,000 for the BMW, and \$11,390 was for miscellaneous personal property located at the Surrey Court residence.

Contrasted to Wife's award of \$137,391, Husband was awarded \$239,241 of the marital estate. Assets awarded to Husband included the home in Huntsville, Alabama, the farm in Lincoln County, Tennessee, all of the farm equipment and livestock, a tractor, tools, the entirety of his retirement accounts, tax refunds, two trucks, the Porsche, and a share of Wife's retirement account. As Husband's Rule 7 table reveals, he was awarded \$239,241 of the marital estate, which included \$10,000, being the modest equity in the farm in Lincoln County, \$88,880 for Husband's retirement accounts, \$43,090 for the 2002 and 2003 Tax refunds, \$30,000 for cattle, \$18,500 for two pickup trucks, \$17,000 for a skid loader, \$12,121 for Wife's 401(k) account, \$7,500 for a bulldozer, \$6,250 for a John Deere tractor, and the balance for miscellaneous items of more modest values.

Although Husband was not restored to the wealth he enjoyed prior to the marriage, as he desired, he was awarded the lion's share of the marital estate that existed at the time of the divorce. In fact, Husband received sixty-four (64%) of the marital estate compared to Wife's thirty-six (36%) percent.

Our trial courts are afforded wide discretion in dividing marital property in divorce cases. Their decisions as to such matters will be presumed to be correct unless the preponderance of the evidence is otherwise. *Manis v. Manis*, 49 S.W.3d 295 (Tenn. Ct. App. 2001); *Loyd v. Loyd*, 860 S.W.2d 409, 411 (Tenn. Ct. App. 1993); *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991).

The trial court found \$92,000 of the payments Wife made toward her student loans were not necessary for the purpose of maintaining her standard of living, that they were in violation of the standard restraining order, and that he would take them into consideration in the equitable division of the marital estate. By awarding Husband sixty-four (64%) of the marital estate, we find the trial court did what it set out to do.

Considering all of the relevant factors, we are unable to conclude that the trial court abused its discretion, as Husband contends, by awarding Husband essentially two-thirds of the marital estate. Finding no error with the trial court's division of the marital estate that remained, we affirm.

⁵The husband's Rule 7 table includes two questionable items of marital property: \$113,122 representing the excess payments on the wife's student loans and \$73,880 representing funds that the wife allegedly failed to account for. We have determined that these items are not marital property and, therefore, that they should not be included in the marital estate or credited to the wife's share of the marital estate. Disregarding these two items, the value of the net marital estate is \$376,632, and the value of the property the wife actually received in the division of the marital estate was \$137,391. As a result of these revisions, the husband received 64% of the marital estate, while the wife received 36%.

ATTORNEY FEES

Wife contends the trial court erred by not awarding her the attorney's fees she incurred. "An award of attorney fees is considered to be within the sound discretion of the trial court, and will not be reversed on appeal if that discretion is not abused." *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002). Considering the facts of this case, and the earning capacity of each spouse, we find no error with the decision to hold each party accountable for their own attorney's fees.

IN CONCLUSION

The judgment of the trial court is affirmed in all respects, and this matter is remanded with costs of appeal assessed against the parties equally.

FRANK G. CLEMENT, JR., JUDGE